BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Services	CC Docket No. 95-185

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

PAUL RODGERS
General Counsel

CHARLES D. GRAY
Assistant General Counsel

JAMES BRADFORD RAMSAY
Deputy Assistant General Counsel

National Association of Regulatory Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 898-2200

March 25, 1996

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Services	**CC Docket No. 95-185**

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.49, 1.415, and 1.419 (1995), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following reply comments addressing various March 1, 1996 filed initial comments to FCC's "Notice of Proposed Rulemaking" ("NPRM") released January 11, 1996, and the "Supplemental Notice of Proposed Rulemaking" ("SNPRM"), released February 16, 1996, in the above-captioned proceeding. Again, NARUC respectfully urges the FCC to ensure maximum State flexibility to prescribe policies regarding interconnection with CMRS providers.

In support of this position, NARUC states as follows:

I. JURISDICTIONAL ISSUES

As predicted in NARUC's original request to extend the time for reply comments, over seventy companies and/or associations filed comments in response the Commission's NPRM and SNPRM. Those commentors favoring State preemption again raised the same erroneous boiler-plate arguments. In the wake of these initial filings, NARUC respectfully suggests that, overall, the record now clearly demonstrates that preemption is inappropriate from both a policy and legal perspective.

A. Preemption is Bad Policy

1 - Preemption is Premature; the proposal to preempt State authority over LEC-CMRS interconnection policy lacks record support.

As NARUC noted in its initial comments, the suggestion to preempt is, at best, premature. First, conspicuously absent from the record in this proceeding is a single example of State interconnection policy inhibiting either the growth or deployment of wireless facilities. The initial comments filed in this proceeding confirm this dearth of complaints. For example, NYNEX points out that the NPRM does not record any complaints received by the FCC on this subject, and states that NYNEX has no complaints by CMRS providers pending in its State jurisdictions. Bell Atlantic states, in its comments at 9-10, that (i) it has interconnected with cellular carriers for more than 10 years and has recently interconnected with a PCS provider and (ii) no CMRS provider has filed a formal complaint before the Commission challenging its interconnection arrangements.[1]

---

[1] Compare, Ameritech's initial comments, at pp. 3 - 5, stating that interconnection is available in al five of its states with a wide range of choices as to both service configuration and billing options. The company even includes for the record an attachment describing the currently available arrangements.

Moreover, at 13 - 14 of its comments, SBC Communications references the ability of its own wireless subsidiary to obtain interconnection arrangements with LECs on favorable terms. According to SBC, in most instances, these LECs are affiliated with one or more CMRS providers that directly compete with its subsidiary, yet that subsidiary was able to negotiate, under the existing jurisdictional regime, reasonable terms and conditions for landline interconnection.

Second, the only empirical evidence available, i.e., the pre-1993 [and post -1993] historical growth and expansion rates of existing wireless operators, strongly suggests that State oversight of interconnection has not inhibited wireless deployment or service in any way. NYNEX's comment, at 11-13 of its March 4, 1996 filing, supports this assertion. There, citing the CMRS industry's sustained growth rate, which exceeds LECs growth by 10 times, NYNEX agrees there is no evidence that development of wireless services has been impeded under the current jurisdictional regime. U S West's comments, at 3 - 6, also point out the well known phenomenal growth of the cellular industry and contend that this growth in customers and revenue, and the huge capital investment, would not have occurred had LEC interconnection prices been unreasonable. U.S. West goes on to point out that AT&T recently paid $16 billion for McCaw and, last year, 18 firms paid $7.7 billion to acquire A and B Block PCS licenses.

According to U S West, "...[t]hese sums were paid with the full understanding that current LEC interconnection arrangements would remain in effect. The auction participants even included the costs of Type 2 interconnection as part of their calculation of the net present value of a PCS license. Clearly, LEC-CMRS interconnection prices are not a deterrent to either new licensees or existing licensees."[2]

Finally, CMRS providers themselves, aside from the SBC affiliate discussed, supra, have indicated that current procedures are adequate. As both SBC Communications Inc, at 15 - 16 of its comments, and U S West, at 1 - 3 and 16 - 21 of its comments, point out, the picture painted by CMRS providers in recent months is much different from their representations to this Commission mere months earlier that LEC-CMRS interconnection arrangements were "working satisfactorily". Citing CTIA's recent comments in Docket 94-54, SBC Communications noted that this largest representative of the wireless industry, recently contended that the negotiation process has satisfied cellular carriers and produced fair and nondiscriminatory interconnection arrangements. At that time, CTIA attributed this result directly to the bargaining power and expertise of the wireless industry. Wisely, CTIA's initial comments in this proceeding eschew any mention of its previous statements and make no effort to explain this change in perspective.

---

[2] See also, pp. 22-23 of U S West's initial comments where it suggests that the most telling point on this issue is the absence of complaints: "CMRS providers have always recognized that the Commission's formal complaint process is available to them...Complaints have not been filed because current CMRS-LEC interconnection arrangements are reasonable."

2 - A preemptive approach is not technologically neutral and will inappropriately favor deployment of a particular technology.

While NARUC supports the efficient use of technology in the provision of local exchange service, we oppose Federal policy that is not technology neutral and has the impact of favoring deployment of one technology over another.

In our initial comments, NARUC contended that an FCC preemptive approach establishing preferential interconnection policies applying only to CMRS interconnection arrangements could have the undesirable impact of favoring wireless technology. Such an approach could give CMRS providers a competitive advantage relative to new wireline local exchange competitors, which could impair the development of economically efficient telecommunications competition.[3] As discussed infra, implicit in the broad role accorded the States in the new legislation is the notion that States are in the best position to monitor the interconnection arrangements that are provided, and should local conditions warrant, impose additional obligations to, *inter alia*, enhance competition and further universal service. Accordingly, NARUC submits that sound public policy augers against the NPRM's preemptive proposals due to the absence in the record of any evidence to support the need for such an approach and the clear danger that these proposals could inappropriately favor the deployment of one technology over another.

---

[3] See, e.g., USTA's comments at pp. 12 - 13, suggesting that FCC interference in the current pricing regimes could distort market signals regarding entry into the local exchange services market. Cf., ALLTELL's comments at 7, noting that interconnection reform should be technology neutral and promote entry of competitive carriers on an equal basis.

B. Preemption cannot be legally supported.

Those commentors that suggested the FCC had authority to preempt State oversight of CMRS-LEC interconnection made basically the same arguments. CTIA's comments, at 56 - 82, and Airtouch's comments, at 43 - 55, are typical. Both argue that (1) § 251 and § 252 do not apply, (2) that the text of § 332 gives the FCC authority to preempt, and that (3) a Louisiana type analysis requires preemption. They are wrong on all three counts.

1 - Mandatory LEC-CMRS interconnection policy binding on the States is counter to the State jurisdiction expressly provided in the 1996 Act.

Airtouch suggests, at 51 - 55 of its comments, that, the Telecommunications Act of 1996 has no impact on LEC-CMRS interconnection arrangements and that § 332(c)(3)'s preemption of State "entry" regulation gives the FCC ultimate authority over matters relating solely to intrastate interconnection. This argument ignores the clear text and intent of § 252 of the 1996 Act, makes no effort to address § 251's express reservations of existing State access and interconnection regulations, and stretches the § 332 prohibition against "entry" regulation beyond recognition. As we stated in our initial comments, § 252 establishes a comprehensive statutory scheme for the interconnection of telecommunications carriers, including CMRS providers, with LEC facilities. Requests for interconnection addressed to "local exchange carriers" and "incumbent local exchange carriers" are controlled by 47 U.S.C. §§ 251 and 252 (1996). If a "telecommunications carrier", defined as "any provider of telecommunications services" [4] seeks interconnection with a LEC, § 252, by its own terms, sets the framework for any federal action.

---

[4] 47 U.S.C. § 153(49), as added by § 3 of the 1996 Act.

Notwithstanding Airtouch's suggestions to the contrary, it is clear that CMRS providers fall within the meaning of the term "telecommunications carrier." The "telecommunications service" provided by such carriers is defined by the 1995 Act as follows: "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." See, 47 U.S.C. § 153(51), as added by § 3 of the 1996 Act. This definition, by its own terms, applies to CMRS carriers. Moreover, the definition was taken from Senate Bill S. 652. The Senate Report for S. 652 states that "[t]his definition is intended to include commercial mobile services." [5]

Accordingly, NARUC respectfully suggests that possible FCC preemption of existing State jurisdiction over LEC-CMRS interconnection would vitiate § 252 which grants State commissions jurisdiction over any interconnection requests directed at LECs in accordance with their duties under § 251 of the 1996 Act.[6] Indeed, Congress specifically forbade the FCC from overriding existing State "access and interconnection" regulations consistent with § 251 when implementing that section.[7]

---

[5] S.Rep. No. 23, 104th Cong., 2nd Sess. 18 (1995); See H.R. Conf. Rpt. No. 458, 104th Cong., 2d Sess. 114-16 (1996).

[6] NARUC is not the only commentor to recognize § 252's implications. See, e.g., ALLTELL's comments at 6 - 7; Ameritech's comments at 11 - 13; Bell Atlantic's comments at 3 -5 & 14 - 15; BellSouth's comments at 32 - 36; and GTE comments at 6 - 9.

[7] "[T]he [FCC] shall not preclude the enforcement of any...order, or policy of a State commission that-- (A) establishes access and interconnection obligations of [LECs]; (B) is consistent with...this section; and (C) does not materially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d) (3)(A)-(C).

2 - Mandatory LEC - CMRS interconnection policies binding on the State commissions is inconsistent with the law and jurisprudence predating the 1996 Act.

Assuming arguendo, it is ultimately determined that § 252 does not apply to CMRS-LEC interconnection arrangements, the Commission still lacks authority to preempt State regulation of the rates, terms, and conditions for the intrastate portion of LEC- CMRS interconnection under pre-existing law. In their comments, both Airtouch and CTIA basically amplify the arguments presented in ¶ 111, mimeo at 53 - 54, of the NPRM, which was drafted before the 1996 Act was signed, suggesting that: (i) the FCC can preempt State regulation as § 332 prohibited "entry " regulation, and (ii) preemption under *Louisiana Public Service Commission v. FCC*, ("*Louisiana*"), 476 U.S. 355, 375 n.4 (1986) is warranted on the basis of inseverability.

As pointed out by NARUC, NYNEX at 35 - 40 of its comments, and others, the record does not justify preemption on either ground. Citing the Supreme Court's opinion in *Louisiana*, NYNEX basically agreed with NARUC's assertion that when the same facilities are used for both intrastate and interstate communications, the FCC's jurisdiction extends only to the interstate portion, leaving the intrastate portion fully subject to State regulatory jurisdiction.

According to NYNEX, the FCC can only preempt in such circumstances if three criteria are met: (1) the matter to be regulated has inter- and intrastate aspects, (2) FCC preemption is necessary to protect a valid federal regulatory objective, and (3) state regulation would negate the exercise by the FCC of its lawful authority because interstate aspects cannot be severed from the intrastate aspects.

First, as the New York commission correctly noted (see, ¶ 105 of the NPRM, mimeo at 51), and the FCC acknowledged in the NPRM at ¶ 111, the Commission has already recognized that cellular and related CMRS service are jurisdictionally severable. Nothing has changed since that acknowledgement of severability occurred. In any case, as Pacific Bell points out in its comments at 101- 103, either the LEC or the CMRS provider can determine the point of origination or termination of a call. In addition, the FCC could use PIUs when needed or adopt another method for determining the jurisdictional nature of the traffic, e.g., the Entry/Exit Surrogate used for FGA and FGB services that lacked ANI capability. Moreover, the vast majority of CMRS traffic is intrastate. Indeed, even if CMRS services "does not respect State lines," apparently individual subscribers do. For example, Pacific Telesis suggests at 31 of its comments, that, at least 90.3 % of its CMRS traffic is intrastate.

For all these reasons, the *Louisiana* inseverability criteria simply does not arise in the stated circumstances.

Second, there has been no showing that a valid federal objective is being threatened by the current regulatory structure. Both Pacific Telesis at 2 - 3 of its comments, and NYNEX at 35, build upon the prematurity arguments discussed, supra, by contending that the *Louisiana* criteria cannot be met, given the explosive growth of the CMRS industry and the absence of any showing that a State regulation impinges upon the FCC's legitimate interest.

Finally, as for the suggestion that State regulation of LEC-CMRS interconnection may constitute § 332 prohibited "entry" regulation, NARUC respectfully notes that, when granting the FCC authority to require physical connections in § 332(c)(B), Congress explicitly noted that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection..." At the time those words were enacted, LEC-CMRS intrastate interconnection arrangements where, under the FCC's own rulings, unequivocally subject to State jurisdiction. Moreover, even without that text, NARUC contends that the Airtouch "entry" argument cannot be supported. A review of the legislative history of the Budget Act, and the tests provided for States to re-enter/continue rate regulation, clarify that Congress intended the preemptive effects of that legislation to apply only to rates charged the end-user/ consumers of such services.

Accordingly, both the 1996 Act and the pre-existing law indicate that FCC preemption of State regulation of CMRS-LEC interconnection is not appropriate.

II. CONCLUSION

NARUC respectfully requests that the Commission carefully examine and give effect to these comments.

Respectfully submitted,

PAUL RODGERS
General Counsel

CHARLES D. GRAY
Assistant General Counsel

JAMES BRADFORD RAMSAY
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

(202) 898-2200

March 25, 1996

Appendix A - Resolution Advocating Federal/State Partnership on CMRS Interconnection and Opposing Federal Preemption

WHEREAS, The Federal Communications Commission (FCC) has issued a Notice of Proposed Rulemaking in CC Docket No. 95-185 and CC Docket No. 94-54 concerning interconnection between local exchange carriers and commercial mobile radio service (CMRS) providers; and

WHEREAS, The FCC has proposed that interconnection between local exchange carriers and CMRS providers be priced on a "bill and keep" basis (i.e., carriers reciprocally terminate calls through a mutual exchange of traffic at no charge); and

WHEREAS, The FCC has also proposed that dedicated transmission facilities connecting local exchange carrier and CMRS networks be priced based on existing access charges for similar transmission facilities; and

WHEREAS, The FCC has asked for comments on whether it should adopt an interconnection model that is not binding on State regulatory commissions, a mandatory preemptive model with broad parameters, or specific preemptive requirements; and

WHEREAS, The "Telecommunications Act of 1996" (this Act) requires that incumbent local exchange carriers provide interconnection on rates, terms, and conditions that are just, reasonable, and nondiscriminatory (Section 251(c)(2)(D)); and

WHEREAS, This Act requires that interconnection arrangements provided by incumbent local exchange carriers through negotiated or arbitrated agreements or offered by Bell operating companies through generally available terms and conditions be submitted to the State commission for approval (Section 252(e) and (f)); and

WHEREAS, This Act requires that a local exchange carrier make any interconnection agreements approved under Section 252 available to any other requesting telecommunications carrier under the same terms and conditions as those provided in the agreement (Section 252(I)); and

WHEREAS, The FCC's proposal to establish preferential interconnection policies applying only to CMRS interconnection arrangements is counter to the policies in this Act prohibiting discriminatory interconnection arrangements; and

WHEREAS, The FCC's proposal to establish preferential interconnection policies applying only to CMRS interconnection arrangements could give CMRS providers a competitive advantage relative to new wireline local exchange competitors, which could impair the development of economically efficient telecommunications competition; and

WHEREAS, CMRS service is jurisdictionally separable, with the vast majority of CMRS traffic being intrastate; and

WHEREAS, The States retain jurisdiction over intrastate interconnection rates, and terms and conditions of intrastate CMRS service under Section 332 of the Telecommunications Act of 1996, and

WHEREAS, Adoption by the FCC of CMRS interconnection policies binding on the State commissions would be counter to the State jurisdiction expressly provided in this Act; and

WHEREAS, Based upon particular local circumstances states should be allowed to determine the best method of mutual compensation for interconnection and transport; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1996 Winter Meeting in Washington, D.C., urges the FCC to ensure the establishment of policies regarding CMRS interconnection arrangements that will not unfairly advantage wireless providers over other potential local exchange competitors; and be it further

RESOLVED, That the NARUC urges the FCC to ensure maximum State flexibility to prescribe policies regarding interconnection with CMRS providers; and be it further

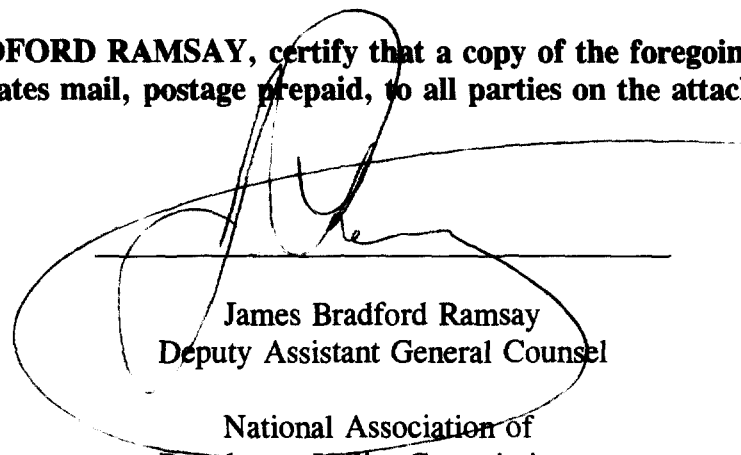
RESOLVED, That the NARUC urges the FCC to develop policies regarding CMRS interconnection arrangements that would not cause interconnecting wireline local exchange carriers to incur uncompensated costs; and be it further

RESOLVED, That the NARUC General Counsel file comments with the FCC conveying these NARUC positions.

Sponsored by the Committee on Communications
Adopted February 28, 1996

CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that a copy of the foregoing was sent by first class United States mail, postage prepaid, to all parties on the attached Service List.



James Bradford Ramsay
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners

March 25, 1996